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No. 77-782

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN IRON AND STEEL INSTITUTE, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 560 F.2d 589. The original opinion of the court of appeals (Pet. App. 29a-129a) is reported at 526 F.2d 1027.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1977. A petition for rehearing was

denied on September 2, 1977. The petition for a writ of certiorari was filed on December 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals exceeded its authority by recalling its mandate and modifying its original judgment in this case, where the court determined that its original decision was inconsistent with a subsequent decision of this Court and with decisions of all other courts of appeals that had dealt with the issue, and where the court further determined that enforcement of its original judgment would disrupt the national program of water pollution control by requiring the Environmental Protection Agency to promulgate for one industry regulations entirely different in form from the comparable regulations promulgated for all other industries.

STATEMENT

On June 28, 1974, the Environmental Protection Agency (EPA) published regulations establishing effluent limitations for point sources in the iron and steel industry engaged in "primary" (or basic manufacturing) operations. 39 Fed. Reg. 24114; 40 C.F.R. 420.10 *et seq.* (Pet. App. 167a-257a). These regulations were part of the nationwide pollution abatement program established by Congress in the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA), 86 Stat. 816, as amended, 33 U.S.C. (Supp. V) 1251 *et seq.*

Petitioners sought review in the Court of Appeals for the Third Circuit, challenging the authority of the EPA to issue effluent-limitation regulations and further contending that the regulations did not conform to the requirements of the FWPCAA. On November 7, 1975, the court of appeals rendered an opinion (Pet. App. 29a-129a) upholding the EPA's authority to issue such regulations but concluding that the ones issued were not in accord with Sections 301 and 304 of the FWPCAA, 33 U.S.C. (Supp. V) 1311 and 1314. Noting that the EPA regulations established only single-number effluent limitations, the court held that Section 301 instead required limitations representing "both the base level or minimum degree of effluent *control* permissible and the ceiling (or maximum amount of effluent discharge) permissible nationwide within a given category" (Pet. App. 53a; emphasis in original). The court further held that guidelines issued under Section 304 were "intended to provide precise guidance to the permit-issuing authorities in establishing a permissible level of discharge that is more stringent than the ceiling" (*ibid.*). The court rejected EPA's position that its recognition of subcategories within the steel industry and its use of variance clauses were adequate to provide the flexibility envisioned by Congress (Pet. App. 55a-56a).

The court of appeals remanded the case to the Administrator for promulgation of Section 304 guidelines specifying "permissible 'ranges' of limitations" and "factors to be taken into account" by the permit-

issuing authority in establishing effluent limitations for particular point sources (Pet. App. 56a-57a). In addition, the court ordered the Administrator to "reconsider the [Section 301] limitations with the base level and ceiling concepts in mind" (Pet. App. 57a). The EPA did not seek rehearing of the decision or a writ of certiorari from this Court.

After the decision of the Third Circuit in this case, four other federal courts of appeals considered whether Sections 301 and 304 required specification of particular "ranges" and "guidance factors," and each reached a conclusion inconsistent with that of the Third Circuit. *Hooker Chemicals & Plastics Corp.* v. *Train*, 537 F.2d 620 (C.A. 2); *American Frozen Food Institute* v. *Train*, 539 F.2d 107 (C.A.D.C.); *FMC Corporation* v. *Train*, 539 F.2d 973 (C.A. 4); *American Petroleum Institute* v. *Environmental Protection Agency*, 540 F.2d 1023 (C.A. 10); *E. I. du Pont de Nemours & Co.* v. *Train*, 541 F.2d 1018 (C.A. 4); *American Paper Institute* v. *Train*, 543 F.2d 328 (C.A.D.C.). This Court granted review in *E. I. du Pont de Nemours & Co.* v. *Train*, *supra*, and affirmed the holding of the Fourth Circuit with respect to that issue. 430 U.S. 112. Stating that the "EPA has the authority to issue regulations setting forth uniform effluent limitations for categories of plants" (430 U.S. at 136), the Court upheld the single-number regulations without requiring development of "ranges" or "guidance factors," noting that the regulations allow for individual differences through grouping by subcategories and allowance of variances. *Id.* at 130-135.

The EPA then moved the court of appeals to recall its mandate in the present case and modify it in conformity with the *du Pont* decision. The court of appeals, after concluding that it had power to take such action in unusual cases (Pet. App. 5a-11a), determined that this was an appropriate case for the exercise of that power. Warning that "the opinion in this matter should not be read as an invitation to litigants to seek review of already adjudicated claims" (Pet. App. 23a), the court stated (*ibid.*):

> [W]e conclude today that recall of the mandate and modification of the judgment in *AISI I* is warranted because of the *confluence* of several unusual factors: the incongruencies, in certain respects, between the opinion in *AISI I* and the Supreme Court's decision in *duPont;* the solitary position of this Court concerning the "range", "guidance" and related matters, a position contrary to that adopted by every court of appeals that has dealt with the issue; the heavy burdens, contrary to the public interest, that adherence to *AISI I* would impose on the national program of water pollution control; the continuing nature of the obligations placed on the agency in the original panel decision; and the relatively moderate effect of the amendment desired by the EPA on the judgment in *AISI I*. [Emphasis in original.]

The court then modified the judgment to conform more nearly with the *du Pont* decision (*id.* at 23a-24a).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any

court of appeals, and presents no issue warranting review by this Court.

1. Petitioners' principal contention (Pet. 7-12) is that the court of appeals improperly decided to recall its earlier mandate in this case. As petitioners apparently concede that the court of appeals had the power to do so,[1] the only issue in dispute is whether the court abused its authority on the particular facts of this case. This is not a question of general importance. In any event, petitioners' contention is without merit.

The court of appeals correctly recognized that the power to recall a mandate should be exercised "only in unusual instances" (Pet. App. 10a). In the present case, the court took into account that the analysis underlying part of its earlier judgment was inconsistent with the decision of this Court in *du Pont* and had been uniformly rejected by other federal courts of appeals. The court further noted that adherence to its earlier judgment would impose a significant continuing burden on EPA and "would prove disruptive to the national program of water pollution control envisioned by the Act" (Pet. App. 18a). Thus, the

[1] See Pet. 7-8. This Court and numerous courts of appeals have agreed that a court may recall its mandate even though the time for rehearing has expired. See, *e.g.*, *Hazel-Atlas Glass Company* v. *Hartford-Empire Company*, 322 U.S. 238; *Reserve Mining Company* v. *Lord*, 529 F.2d 181 (C.A. 8); *Aerojet-General Corp.* v. *American Arbitration Ass'n*, 478 F.2d 248 (C.A. 9); *Greater Boston Television Corp.* v. *Federal Communications Commission*, 463 F.2d 268 (C.A.D.C.); *Gradsky* v. *United States*, 376 F.2d 993 (C.A. 5); *Legate* v. *Maloney*, 348 F.2d 164 (C.A. 1); *Hines* v. *Royal Indemnity Co.*, 253 F.2d 111 (C.A. 6).

decision to withdraw the mandate was based on a "*confluence* of several unusual factors" (Pet. App. 23a; emphasis in original).

Because "decisions concerning the propriety of such relief must be rendered on a case-by-case basis" (Pet. App. 11a), there is no substance to petitioners' argument (Pet. 9-12) that the decision below conflicts with decisions of other courts of appeals declining to recall mandates. Neither *Iverson* v. *Commissioner*, 257 F.2d 408 (C.A. 8), nor *Legate* v. *Maloney*, 348 F.2d 164 (C.A. 1), involved a similar "confluence of unusual factors"; each simply reflects the exercise of judicial discretion on dissimilar facts. Indeed, the Court of Appeals for the Eighth Circuit has recently elected to recall its mandate in a later case, *National Independent Meatpackers Association* v. *Environmental Protection Agency*, No. 74-1387, decided April 6, 1977 (see App. B, *infra*), where the petitioners had similarly pointed out (App. A, *infra*) that the court's decision was inconsistent with the subsequent holding of this Court in *du Pont*.

In reaching its decision in this case, the court of appeals correctly concluded that its original opinion was at least partly inconsistent with this Court's decision in *du Pont*. While the court did not regard its original decision as "demonstrably wrong," it recognized that this Court in *du Pont* had taken a different view of several key issues. Thus, this Court did not order the development of "range" or "guidance" factors for the Section 304 guidelines, or any alteration of the Section 301 limitations. This Court determined

that under procedures adopted by the EPA, including use of development documents and supporting materials, the purposes of the Section 304 guidelines had been "substantially achieved." This Court found that the EPA's use of subcategorization satisfied congressional expectations regarding a "range," and that EPA's variance procedure was an appropriate part of the effluent limitations guidelines. 430 U.S. at 130-135; see Pet. App. 12a-14a.

It was also proper for the court of appeals to consider the decisions of other circuit courts on these issues. The iron and steel regulations involved here are but one part of a nationwide regulatory system extending to virtually all segments of American industry. Nothing in the FWPCAA suggests that Congress intended certain industries to be regulated by effluent limitations guidelines significantly different in form from those regulating other industries. The result of the court's refusal to modify its mandate would have been, as the court pointed out, that "the pollution control regulations to be applied to categories of similar industrial dischargers would become discordant, with a special set of regulations to govern the iron and steel industry *and* perhaps other industrial categories in the Third Circuit alone" (Pet. App. 18a-19a; emphasis in original). As the Court of Appeals for the Eighth Circuit recently observed in *National Independent Meatpackers Association* v. *Environmental Protection Agency*, 566 F.2d 41, 43:

> Uniform regulation of water pollution on a nationwide basis was a major purpose of the Federal Water Pollution Control Act Amendments. *See E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 * * * (1977). We are confident that inter-circuit conflicts as to the validity of regulations promulgated pursuant to the Act would seriously impede the EPA's ability to effectively implement the program envisioned by Congress in passing the Act. The interest in avoiding inter-circuit conflicts is especially strong when the potentially conflicting decisions would present different interpretations of federal law intended to be uniformly applied on a nationwide scale.

2. Although petitioners also urge this Court (Pet. 15-17) to review the merits of the decision below, there is no reason to do so. It is now settled law that EPA may promulgate single-number effluent limitations pursuant to Sections 301 and 304 of the Act and that those limitations are binding on permit-issuing authorities, subject only to the variances contained in the regulations themselves. In the light of *du Pont*, it is also established that EPA's single-number limitations are "presumptively applicable," subject only to rebuttal through the variance clause.[2] Further review of these matters, before the lower courts have

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[2] Any disagreement among the circuits on this point prior to *du Pont* was settled when this Court accepted the Fourth Circuit's position of presumptive applicability subject to variance rebuttal, except insofar as the Fourth Circuit had extended the variance provision to new source standards. See 430 U.S. at 138-139.

had a reasonable opportunity to consider and apply the principles set forth in *du Pont*, would be both unnecessary and premature.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978

APPENDIX A

UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 1387

THE NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION, a District of Columbia not-for-profit corporation; IOWA BEEF PROCESSORS, INC., a Delaware corporation; J. H. ROUTH PACKING COMPANY, an Ohio corporation; MBPXL CORPORATION, a Missouri corporation; TAMA MEAT PACKING CORPORATION, an Iowa corporation; CALDWELL PACKING COMPANY, INC., a Minnesota corporation; WESTERN MEAT PACKERS, INC., an Arkansas corporation; DONNER PACKING COMPANY, a Wisconsin corporation; BIG FOOT PACKING COMPANY, an Illinois corporation; SPENCER FOODS, INC., a Delaware corporation; PEET PACKING COMPANY, a Michigan corporation; ARBOGAST & BASTIAN, INC., a Pennsylvania corporation; MINDEN BEEF COMPANY, a Nebraska corporation; PLATTE VALLEY PACKING COMPANY, a Nebraska corporation; DUBUQUE PACKING COMPANY, an Iowa corporation; ROBEL BEEF PACKERS, INC., a Minnesota corporation; MADISON FOODS, INC., a Nebraska corporation; NATIONAL BEEF PACKING COMPANY, a Delaware corporation; ROODE PACKING COMPANY, a Nebraska corporation; C. FINKBEINER, INC., an Arkansas corporation; DIGGS PACKING COMPANY, a Missouri corporation; and ADA BEEF COMPANY, a Michigan co-partnership,
PETITIONERS,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT.

PETITIONERS' MOTION TO RECALL MANDATE

The petitioners, The National Independent Meat Packers Association, *et al.*, move the Court for an order to recall the mandate previously issued on June 19, 1975, that dismissed their appeal for lack of subject matter jurisdiction. *Nat'l Independent Meat Packers Assn.* v. *U.S. Environmental Protection Agency*, 517 F. 2d 1407 (8th Cir. 1975). They seek by this motion to have their petition for review of the action of the United States Environmental Protection Agency in promulgating an amendment to 40 C.F.R., Chapter I, Subchapter N, by adding Part 432 entitled "Effluent Guidelines and Standards for the Meat Products Manufacturing Point Source Category," reinstated for the purpose of judicial review of the merits of that action. The regulations over which review is sought were promulgated pursuant to the Federal Water Quality Amendments of 1972. 33 U.S.C. §1311, *et seq.* The motion is brought under Federal Rule of Appellate Procedure 27 and Eighth Circuit Rule of Procedure 2(c) for all of the reasons stated in the accompanying memorandum.

Dated: March 19, 1977.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 1387

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PETITIONERS,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO RECALL MANDATE.

I. THE COURT HAS THE INHERENT POWER TO RECALL ITS MANDATE TO PREVENT INJUSTICE.

Inherent in the appellate courts is the power to recall a mandate. *Riha* v. *International Tel. & Tel. Corp.*, 533 F. 2d 1053, 1055 (8th Cir. 1976) (per curiam); *Reserve Mining Co.* v. *Lord*, 529 F. 2d 181, 188 (8th Cir. 1976) (en banc). The exercise of the power is founded in equity jurisprudence. The power is invoked to prevent injustice. *Greater Boston Television Corporation* v. *F.P.C.*, 463 F. 2d 268, 276-279 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Accordingly, the determination of whether the power should be exercised turns upon the need shown on the facts of this particular case. *Id.* at 277; *Application of Jones*, 542 F. 2d 65, 68 (C.C.P.A. 1976). It is manifest upon examination of the procedural history in this case that the mandate must be recalled in order that petitioners finally will be afforded the judicial review which they have diligently sought on the merits of their claims.

II. ABSENT RECALL OF THE MANDATE PETITIONERS WILL BE DENIED THEIR RIGHT TO JUDICIAL REVIEW OF THE MERITS OF THEIR CLAIM.

The National Independent Meat Packers Association, *et al.*, has taken every measure legally necessary or possible to obtain judicial review of the merits of the "Effluent Guidelines and Standards for the Meat Products Manufacturing Point Source Category" promulgated by the Environmental Protection Agency. The guidelines, if valid, will impose upon the petitioners substantial waste treatment costs. Yet, to date no court has heard the merits of the petitioners' claims. The Eighth Circuit found itself without subject matter jurisdiction to hear the merits of the petitioners' claims on the basis of *CPC International Inc.* v. *Train*, 515 F. 2d 1032 (8th Cir. 1975). The district court is without subject matter jurisdiction to hear the merits of the petitioners' claims on the basis of *E.I. duPont de Nemours & Co., et al.* v. *Train, Administrator, Environmental Protection Agency, et al.* (Supreme Court, February 23, 1977). The procedural history is summarized as follows:

1. The challenged regulations of the Environmental Protection Agency (EPA) were published on February 28, 1974. 39 Federal Register 7894-7906.

2. The petitioners filed their petition for review before this Court within the statutory 90-day period on May 24, 1974.

3. Just prior to the date by which petitioners' reply brief was to be filed, this Court, on May 5, 1975, issued its decision in *CPC International Inc.* v. *Train, supra (CPCI). CPCI* involved a parallel challenge to EPA regulations involving another industrial category. It held that the regulations were effluent guidelines under section 304 of the Federal Water Quality Amendment of 1972, 33 U.S.C. §1311, *et seq.* and, accordingly, were not reviewable to the Courts of Appeal under section 509 of the Act. 33 U.S.C. §1369.

Since the decision in *CPCI* was dispositive of the petitioners' petition for review, and given this Court's guidance in *CPCI* with regard to the district courts being the appropriate forum for judicial review, petitioners sought the most expeditious route to obtain that review. Accordingly, on May 12, 1975, they moved this Court for summary decision on their petition for review on the basis of *CPCI*. Following EPA's written concurrence to the motion, it was granted on June 19, 1975. *Nat'l Independent Meat Packers Assn.* v. *U.S. Environmental Protection Agency*, 517 F. 2d 1407 (8th Cir. 1975).

Petitioners then brought suit in the District Court for the District of Nebraska putting in issue the legality of the regulations of the EPA.

5. On July 28, 1976, the district court granted the petitioners a temporary injunction enjoining enforcement of the regulations. The district court said:

> However, in light of the jurisdictional questions, further action on this Court's part, and on the part of the EPA may very well be an exercise in futility. In all fairness to the Eighth Circuit, they were the first Circuit Court to interpret this vague, imprecise Act, and it is highly probable that today the Eighth Circuit *en banc* would overrule *CPC Int'l.* It is well established that parties cannot confer subject matter jurisdiction on a court and, *a fortiorari,* an appellate court cannot create and confer jurisdiction that does not exist under statute. The Court, after careful consideration of all the factors, determines that its only practical course in this dilemma is to hold that plaintiffs have shown immediate and irreparable injury and a probability of success on the merits, thereby warranting the issuance of a preliminary injunction pursuant to 5 U.S.C. §705 *and to hold further review of the regulations in abeyance pending resolution of the jurisdiction question* by the Supreme Court in *duPont* v. *Train, supra,* or by the Eighth Circuit. Further inquiry by this Court into the Administrative record, with a commensurate order remanding the regulations to the EPA for reconsideration within a shortened period would be unfair to the EPA in the event that this Court is without subject matter jurisdiction. (Memorandum of July 28, 1976, at 10). (Emphasis supplied. Memorandum attached as Exhibit A.)

As stated, the merits of the petitioners' claims were specifically avoided by the district court. The court below recognized the hardship this placed upon the petitioners in light of *CPCI*, but was more influenced by its belief that it did not have, contrary to the law of the Eighth Circuit, subject matter jurisdiction. The district court said:

> Although the Court sympathizes with litigants who may be shuttled between courts, this hardship may be alleviated somewhat by waiving the 90-day time-barring provision of §509, 33 U.S.C. §1369(b)(1), and a decision on the full merits at this time may only serve to increase that hardship. (Memorandum of July 28, 1976, at 11.) (Memorandum attached as Exhibit A.)

6. On February 23, 1977, the Supreme Court issued its decision in *E.I. du Pont de Nemours & Co., et al.* v. *Train, Administrator, Environmental Protection Agency, et al., supra,* which holds that subject matter jurisdiction of the petitioners' claims lies in the court of appeals. On February 25, 1977, the EPA moved the district court to vacate the injunction and dismiss the petitioners' complaint for lack of jurisdiction. There is no doubt that the motion should and will be granted. The EPA has not offered, as suggested by the district court, to waive the statutory period of 90 days, long past, in which to bring a second petition for review of the regulations. Indeed, it is not clear that the EPA could waive the statutory period.

The petitioners have been before two courts. On each occasion they have incurred substantial costs in undertaking a comprehensive technical and legal analysis of the voluminous adminsitrative record and numerous legal briefs filed. Yet, to date, these efforts have not resulted in a review of the merits of their claims. Clearly, petitioners are the parties most affected by the regulations which,

they claim, are contrary to law. Their claims are meritorious. The petitioners have shown to the district court a probability of success should the merits be reached. Justice requires this court to recall its mandate to afford petitioners their statutory right to judicial review of the legality of the regulations.

III. RECALL OF THE MANDATE TO PREVENT INJUSTICE WILL NOT FRUSTRATE THE COMPETING INTEREST OF FINALITY OF JUDICIAL DECISIONS.

The Eighth Circuit has held in conformity with prevailing law that the power to recall mandates should be exercised sparingly. *Riha* v. *International Tel. &. Tel. Corp., supra* at 1055. Restraint is exercised so as not to frustrate the competing interest of finality of judgments which brings an orderly end to litigation. *Powers* v. *Bethlehem Steel Corporation,* 483 F. 2d 963, 964 (1st Cir. 1973). Substantial justice is afforded litigants when they have had their day in court even though the decision rendered is arguably wrong. Recall of a mandate is not intended to be a basis for granting rehearings out of time. *Greater Boston Television Corporation* v. *F.C.C., supra* at 277.

Nevertheless, courts have recognized that the factual situation presented by the instant motion is one that requires exercise of the power to recall the mandate. The court stated in *Powers* v. *Bethlehem Steel Corporation, supra* at 964-965:

> "If we were in error in this appraisal, of which we are not presently persuaded, we believe it would be far greater error to permit reconsideration now after denial of petition for rehearing and certiorari. There must be an end to dispute. *If a situation arose, such as a subsequent decision by the Supreme Court,*

> *which showed that our original judgment was demonstrably wrong, a motion to recall mandate might be entertained.*" (Emphasis supplied.)

The Supreme Court's decision in *du Pont* shows demonstrably the error in *CPCI.*

Moreover, there is more reason to grant the petitioners their motion to recall the mandate than was present in the situation posited in *Bethlehem Steel.* Unlike *Bethlehem Steel* where the litigants received judicial consideration on the merits and the court was asked to reverse itself, this Court is simply asked to take review of the merits in the first instance. The power to afford a litigant two days in court should be exercised sparingly. The power to afford a litigant its only day in court should be exercised without restraint.

There should be no restraint of the exercise of the power to recall the mandate because finality has not attached to the regulations of the EPA. The legal validity of the regulations has been continuously in issue since the petitioners' petition for review was filed May 24, 1974. This Court's recall

> The process thus combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a "partnership" in furtherance of the public interest, and are "collaborative instrumentalities of justice." *The court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance.* (Emphasis supplied.)

Application of the standard of review announced in *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971), will ensure that the court will not intrude into the area of discretion vested by Congress in the EPA. Recall of the mandate is necessary to fulfill the second

part of the combination: exercise of the court's supervisory function to ensure conformance with the pertinent requirements of law. Because the court is not "a hostile stranger" to the administrative process, but is a part of it, and because that process has not been completed, the public's interest as well as the interests of the petitioners require the court to recall the mandate.

V. CONCLUSION.

The petitioners have diligently sought judicial review of the merits of EPA regulations that directly and substantially affect their industry. Because of a unique combination of events, their efforts have been completely frustrated. They have been on a circuitous route through two courts, each of which has stated the other to possess proper jurisdiction. Given the Supreme Court's decision in *du Pont* the jurisdictional issue is now settled and justice requires that the mandate of this court be recalled. A recall of the mandate will afford the petitioners their long-awaited right to judicial review of the legality of the EPA regulations.

Dated: March 19, 1977.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that I mailed, postage prepaid, a copy of the foregoing Petitioners' Motion To Recall Mandate and Petitioners' Memorandum In Support Of Their Motion To Recall Mandate to:

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Dated: March 19, 1977.

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Allen Hinderaker

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THE NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION, ETC., ET AL,
PETITIONERS,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL,
RESPONDENTS.

No. 74-1387.

September Term, 1976

PETITION FOR REVIEW OF PROMULGATION OF AN AMENDMENT, ETC.

On July 16, 1975 certified copies of the Court's judgment of June 19, 1975 were transmitted to counsel in lieu of issuance of mandate.

On consideration of various motions now pending before the Court it is now ordered:

(1) Petitioners' unopposed motion to recall mandate is granted. The Clerk of this Court is to re-open this case on the records of the Court.

(2) Suggestion of respondent United States Environmental Protection Agency that the case be transferred to the United States Court of Appeals for the Seventh Circuit is denied. We deny the transfer as the Seventh Circuit has already decided the case previously before it. *American Meat Institute* v. *EPA*, 526 F. 2d 442 (1975).

(3) The Clerk of this Court is directed to establish a schedule for the parties to submit revised or supplementary briefs should either petitioners or respondents desire to do so.

April 6, 1977.

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